SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 53

WAYNE TURNER,

Appellant,

vs.

LOUISIANA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

APPELLANT'S BRIEF ON THE MERITS

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Opinions of Lower Courts

The opinion of the Supreme Court of the State of Louisiana is reported at:

244 La. 447 (official) and at

152 So. 2d 555 (unofficial)

Basis of Jurisdiction

Appellant is before this Court pursuant to an order of this Court dated March 23, 1964, dismissing the appeal and granting a writ of certiorari, which said order is fully reproduced at page sixty-eight (68) of the "Transcript of Record" filed herein.

Constitutional Provisions and Statutes Involved

This case involves the following provisions of the Constitution of the United States:

(1) "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution, Amendment V.

(2) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." United States Constitution, Amendment VI.

(3) "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amendment XIV, § 1.

This case involves the following provision of the Constitution of the State of Louisiana:

(1) "In all criminal prosecutions the accused shall have the right to a speedy, public and impartial trial in accordance with the provisions of this constitution. All trials shall take place in the parish in which the offense was committed, unless the venue be changed; except that the Legislature may provide for the venue and prosecution of offenses when one of the acts constituting an offense or an element of the offense occurs in a parish of this state and other acts or elements thereof occur out of the parish or state, or when an offense is committed in this state but the exact place of the commission of the offense in this state cannot be established. The Legislature may provide for the venue and prosecution of offenses committed within 100 feet of the boundary line of a parish. The accused in every instance shall have the right to be confronted with the witnesses against him; he shall have the right to defend himself, to have the assistance of counsel, and to have compulsory process for obtaining witnesses in his favor. Prosecution shall be by indictment or information; but the Legislature may provide for the prosecution of misdemeanors on affidavits; provided, that no person shall be held to answer for capital crime, unless on a presentment or indictment by a grand jury, except in cases arising in the militia when in actual service in time of war or public danger. No person shall be twice put in jeopardy of life or liberty for the same offense, except on his own application for

a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained." Louisiana Constitution, Article I, § 9.

This case involves the following statutory provision of the State of Louisiana:

(1) "From the moment of the acceptance of any juror until the rendition of verdict or the entry of a mistrial, as the case may be, the jurors shall be kept together under the charge of an officer in such a way as to be secluded from all outside communication; provided that in cases not capital the judge may, in his discretion, permit the jurors to separate at any time before the actual delivery of his charge." West's Louisiana Statutes Annotated, R. S. 15:394.

Issues Presented for Review

The issues presented by this case for review all revolve around the (mis)handling of the petit jury during the three day felony murder trial of the accused, Wayne Turner. Basically the accused urges that his conviction was obtained from a jury which had been handled in such a way as to violate the civil rights of the accused, and in particular the right of an accused to a trial by a fair and impartial petit jury.

In the opinion of counsel for Wayne Turner, the issues presented to this Court for review may be stated as interrogatories as follows, to-wit:

(1) Assuming that state law prohibits both the physical separation of the jury members from each other and prohibits the jury from coming in contact with outside influence, is an accused in a capital case entitled to a new trial where both of these state laws are violated or must the

accused show that actual misconduct and/or prejudice resulted from the violation of the law?

(2) Assuming that state law prohibits both the physical separation of the jury members from each other and prohibits the jury from coming in contact with outside influence, is an accused in a capital case entitled to a new trial when both the physical separation and contact with outside influence occurs in the presence of key witnesses for the prosecution, even though these witnesses be deputy sheriffs in whose custody the jury has been placed by the Sheriff but without the consent of the accused?

(3) In a capital case, is the accused entitled to a new trial when, without his consent, the jury has been placed in the custody of deputy sheriffs who testify as to vital portions of the prosecution's case during a three day trial and who freely associated with the jury?

(4) Are the provisions of the Constitution of the United States violated, and the accused in a capital case thereby denied his civil rights and his right to a trial by a fair and impartial jury, when both physical separation of the jury members and mingling of the jury with witnesses for the prosecution occurs, or must the accused prove that actual misconduct and/or prejudice resulted therefrom?

(5) If it be determined that the accused must prove the occurrence of actual misconduct and/or prejudice, what evidence will sustain the burden thereby placed upon him?

Statement of the Case

The appellant, Wayne Turner, was tried and convicted of the murder of Albert Young during an attempted armed robbery.

The victim, Young, was employed as night attendant of a Phillips 66 Service Station just West of Hammond, Louisiana. Turner, who was under considerable mental strain brought about by his wife's pregnancy and lack of food, sleep and funds, appraised Young that it was his intent to rob the service station. At this point, Young drew a concealed revolver from his pocket. Shots were exchanged and Young was killed.

Wayne Turner admitted the crime and signed a confession the following day, prior to being allowed any contact with an attorney. No one doubts that Albert Young died at the hand of Wayne Turner. It is equally apparent, however, that no one would have died at all but for the foolhardy armed resistance by Young.

During the trial the State of Louisiana offered the sworn oral testimony of Chief Criminal Deputy Hulon Simmons and Deputy Vincent Rispone.

Deputy Simmons gave testimony vital to establishing the chain of evidence for the State's exhibits (Transcript of Record, page 21). In addition, he testified that Turner had made certain damaging admissions in his presence (Transcript of Record, page 34), and that a written confession signed by the defendant was freely and voluntarily given (Transcript of Record, page 52).

Deputy Rispone gave vital oral testimony regarding the investigation (Transcript of Record, page 22); other testimony essential to establish the chain of evidence (Tran-

script of Record, pages 25-26) and still other testimony to the effect that Turner led him to the weapon which was found in the woods behind the station together with Turner's identification cards (Transcript of Record, page 25).

During the trial, counsel for Wayne Turner objected to the testimony of these two witnesses and moved for a mistrial (Transcript of Record, page 15), which was overruled (Transcript of Record, page 29). After verdict, counsel for Wayne Turner renewed the objection through a motion for a new trial (Transcript of Record, page 16) which was not granted.

Turner's conviction carried with it a mandatory death sentence. The Louisiana Supreme Court heard the appeal and refused to grant a new trial.

The case is now before this Court for a review on a writ of certiorari.

The grounds advanced by counsel for Wayne Turner in objecting to the testimony of Deputies Simmons and Rispone and in seeking a new trial were specified in the motion for a mistrial (Transcript of Record, page 15) and in the written motion for a new trial (Transcript of Record, page 16). Both motions were overruled and this action was affirmed by the Louisiana Supreme Court on appeal. *State v. Turner*, 244 La. 447, 152 So. 2d 555 (1963).

Argument

May It Please the Court:

State Law:

Objections to the admissibility of testimony of Deputies Simmons and Rispone, the motion for mistrial and the motion for a new trial were based on the facts that these two deputies were chief witnesses for the prosecution and that they:

(1) Served members of the jury venire with summonses to be present for voir dire examination on the day of the trial;

(2) Associated freely and on a friendly and personal basis with prospective jurors on the first day of the trial prior to and during the selection of the petit jury;

(3) Took the petit jury into custody during the three days of the trial, sleeping, eating and associating with the jury during the course of the trial;

(4) Allowed the petit jury to be separated into two or more groups on nine occasions during the trial for purposes of traveling 4 miles round trip to a restaurant for meals;

(5) Allowed one petit jury member, Mr. Paul Cassanova, to be isolated from all other members of the jury in their company or in the company of one of them for a time and in the company of one other deputy sheriff during a two mile automobile ride while returning from the restaurant;

(6) Associated with the petit jury members, ran errands and made telephone calls for them, supplied their needs and wants generally, and mingled with and

became a part of and identified as a member of the group, all during the trial of the case, and after the trial but before verdict.

It is unquestionably true that the testimony of both of these two deputy sheriffs was essential to the establishment of the case for the State and that the State knew the value of their testimony (Transcript of Record, page 18).

The *per curiam* attached to the bill of exceptions by the trial judge (Transcript of Record, page 20), indicates that the trial judge was under the mistaken impression that both deputies had testified:

(1) That they had never discussed anything having any bearing on the case with any member of the jury.

(2) That they had never discussed the case with each other or other deputies in the presence of the jury.

(3) That they had never heard any aspect of the case discussed by any member of the jury.

This Court's attention is respectfully directed to the testimony of Deputy Rispone relative to the motion for a mistrial (Transcript of Record, pages 27-29). Deputy Rispone was not asked these or any questions by the court or by the prosecution. The motion for a mistrial was simply overruled.

Deputy Simmons did testify with reference to a renewed motion for mistrial that he had not discussed the case with members of the jury nor in their presence nor heard it discussed by them. Deputy Simmons was asked: "Q. To the best of your knowledge has Dy. Rispone in your presence, had any conversation with regard to this case?" He answered "A. To my knowledge he has not" (Transcript of Record, page 37).

This is evidently the testimony that the trial judge thought he heard from Deputy Rispone on this point for the record is otherwise barren of any testimony by or about Deputy Rispone regarding his conduct with the jury. As a single exception, Deputy Rispone tesfified he did not discuss the case with juror Paul Cassanova on the occasion of returning from Ardillo's Restaurant (Transcript of Record, page 28).

Deputy Simmons further testified however (Transcript of Record, page 37), that Deputy Rispone was not alone with Mr. Cassanova while he, Simmons, was inside signing the lunch check. Deputy Simmons, not being outside at the time could not have known where Deputy Rispone and Mr. Casanova were, whether they were alone or not, and if not alone as stated by Deputy Simmons, who was with them? Nor could Simmons have any knowledge of what was discussed while he was not present.

The State question can be conveniently subdivided into two parts:

(1) The law of the State of Louisiana regarding separation of the jury members from one another has been violated.

(2) The law of the State of Louisiana regarding segregation of the jury from all outside influence has been violated.

PHYSICAL SEPARATION OF THE JURY MEMBERS FROM ONE ANOTHER

Louisiana Revised Statute 15:394, set forth in its entirety under the section of this brief entitled "Constitutional Provisions and Statutes Involved", wisely requires that from the moment of acceptance of any juror in a capital case until the rendition of verdict, the jurors shall

be kept together in such a way as to be secluded from all outside communication. This statute was intentionally violated at least nine times during the trial of this case. Three times on each of the consecutive three days of the trial, the jury was transported to Ardillo's Restaurant, approximately two miles from Amite, being divided into three automobiles for the trip, both there and back (Transcript of Record, page 28).

A most flagrant violation of this statute occurred when one juror, a Mr. Paul Casanova, was allowed to travel a distance back to the Court House following the noon meal on the first day of the trial, alone, save for the company of three Deputy Sheriffs, two of whom were Deputies Simmons and Rispone. The third deputy was unidentified and drove the automobile. The evidence discloses that for a time at least Mr. Casanova may have been alone with Deputy Rispone—and possibly unattended altogether (Transcript of Record, page 37). As Deputy Simmons was not present he did not know whether Deputy Rispone was alone with Mr. Casanova or not.

The above detailed conduct by Deputies Simmons and Rispone is contrary to State law regarding handling of petit juries and therefore constitutes adequate reason to set the verdict aside.

In *State* v. *Hornsby*, 8 Rob. 554, 558-9, a case decided in 1844, the Louisiana Court enunciated the rule of law for Louisiana applicable to this situation and gave the reason therefor as follows, to-wit:

> "In capital case, the jury should not be permitted to separate after they have been sworn, either with or without the consent of the prisoner. This rigor which the court conceives to have been the universal practice in the country parishes, can lead to no bad conse-

quences. *This precaution is necessary to protect the accused from any undue influence which may be exercised upon the members of the jury, even without their knowledge, and cannot be tortured into a disparagement of their integrity. Improper impressions may and will be made upon their minds by artful and designing men, of which they may be perfectly unconscious;* neither can they shut their ears to the expression of popular opinion; and as well might the administration of the juror's oath be considered as conveying a doubt of his integrity, as this temporary seclusion from intercourse with the community at large. In cases not capital, courts may, in their discretion, permit the jury to disperse until after they have received the charge of the court; but they should not be permitted to separate after the charge has been given. In these cases, misconduct on the part of the jury will set aside their verdict; in capital cases, upon a separation, misconduct and abuse will always be presumed." (Emphasis added.)

The rule of the *Hornsby* case was followed in 1850 in the case of *State* v. *Desmond*, 5 La. Ann. 398, and again in 1856 in the case of *State* v. *Costello*, 11 La. Ann. 283.

In 1857 in *State* v. *Populus*, 12 La. Ann. 710, the *Hornsby* case was quoted with approval, as it was in 1869 in the case of *State* v. *Evans*, 21 La. Ann. 321.

So well settled was this rule of law in Louisiana that the entire opinion in *State* v. *Frank*, 23 La. Ann. 213, an 1871 case, consists of the following language, to-wit:

"On an indictment for murder the defendant was tried and convicted of manslaughter, and, being sentenced to the Penitentiary for ten years, he has appealed.

On motion for new trial it was shown that there was a separation of the jury twice during the progress of the trial. In capital cases it is well settled, that jurors are not permitted to separate, and that upon a separation misconduct and abuse will always be presumed. *State* v. *Crosby*, 4 An. 435; *State* v. *Evans*, 21 An. 321.

It is therefore ordered that the judgment appealed from be set aside and annulled, and that this case be remanded for new trial, and to be proceeded in according to law."

In 1889 in the case of *State* v. *Nockum*, 41 La. Ann. 689, 6 So. 729, the Louisiana court again approved the rule of the *Hornsby* case but properly failed to find any actual separation of the jury. The allegation of separation in the *Nockum* case was that one juror went to the water closet unaccompanied by the entire jury and a deputy sheriff. The jury actually stood 15 to 20 feet from the door of the cubicle which remained partially opened.

In the case of *State* v. *Warren*, 43 La. Ann. 828, 9 So. 559, the court, after finding that part of the jury was left unattended, made, at page 829, the following observations:

"They were accessible; misconduct is presumed."

The court also pointed out on the same page that:

"The dereliction on the part of the sheriff is censurable."

It is respectfully submitted that prejudice is to be presumed in the case at bar and that the conduct of the Sheriff's office of Tangipahoa Parish in this instance is "censurable".

It is not every case of separation, however, that will automatically result in the setting aside of a jury verdict. The presumption which automatically arises may be re-

gated by sufficient evidence being offered to remove any suspicion of the propriety of the conduct. Thus, in the case of *State* v. *Joiner*, 163 La. 609, 112 S. 503, at page 507, the court after again affirming the rule of the *Hornsby* case reasoned that:

> "It is true that this presumption may be overcome by showing that the accused was not prejudiced by the separation of the jury."

It is submitted that in the instant case the State has not refuted this presumption of abuse, misconduct and prejudice as to the separation of Paul Casanova. It is likewise submitted, and undeniable, that on the other eight occasions when the jury was physically separated from each other there was no showing by the State and no attempt to show that the accused was not prejudiced by the separation. Only as to the separation of Mr. Casanova was even a weak attempt made by the prosecution to rebut the presumption of prejudice.

There are a number of cases in Louisiana which support the proposition that a temporary and/or accidental separation of the jury does not give rise to the presumption of prejudice to the accused. Such is *State* v. *Smith*, 156 La. 818, 101 So. 209. An accidental separation occurred when a door blew closed. The one juror caught alone on the wrong side of the door was within the sight of a deputy and the duration of the separation was momentary.

It is respectfully submitted that under the law of the State of Louisiana, in a situation such as the one involving Juryman Paul Casanova in particular and involving the nine trips to the restaurant during the course of this trial in three separate automobiles, there exists a clear intentional violation of the statute and not an accidental separation only and that a presumption arises that the accused has

been prejudiced thereby. This prejudice is sufficient, if not adequately refuted by the State, to set aside a verdict of guilty and require a new trial.

In writing the opinion of the Supreme Court of Louisiana, Justice Hawthorne fell into the same error that the trial judge committed when, in his *per curiam* to the bill of exceptions, the trial judge stated that both deputies testified on the hearing of the motion for a mistrial that they had not discussed the case with any jury member nor had they heard the case discussed by the jury nor had they discussed the case with each other or other deputies within the presence of the jury. The record simply does not bear this out as to the incident with Mr. Casanova and certainly not as to the other eight separations.

The facts which constitute a violation of state law, are adequate, in the opinion of counsel, to justify vacating the verdict of guilty and ordering a new trial.

Actually the state Supreme Court failed to clearly distinguish between the physical separation of one jury member from another which is involved in this case and the seclusion or segregation of all of the jury members from outside influence, which is also involved in this case.

Seclusion of the Jury Members From Outside Influence

What is outside influence? Certainly juries must be secluded from designing persons who would intentionally strive to influence the verdict. Certainly they should be secluded from the attorneys and the defendant who, through a misplaced sense of duty or overzealousness might influence the verdict. Certainly the jury should be secluded from the witnesses whose credibility, veracity and perception they must weigh.

The situation is no different when the witness happens to be a deputy sheriff who, pursuant to his oath of office, is ordered to seclude the jury from all outside influence. Indeed, the situation is no different if the deputy is not a witness. Deputy Sheriffs, be they witnesses or not, are not by virtue of their duty to seclude the jury, given license to free and unrestricted communication and association with the jury. This duty to seclude the jury ought to mean—and does mean—to seclude the jury from communication with the deputies themselves, except such as is necessary to the discharge of the duty of secluding the jury. The mandate of the statute to segregate the jury from all outside communication would not appear to be a license to deputy-witnesses or even for deputy-non-witnesses to mingle with the group, make new acquaintances and renew old friendships.

The jury was most certainly not segregated or secluded from the influence of the deputy sheriffs themselves, and in particular from prosecution witnesses who were also deputy sheriffs. These two deputy sheriffs mingled freely with the jury, eating with them, traveling with them, talking to them during recesses, running errands for them, making telephone calls, delivering messages to their families and the like. In short, the two deputy sheriffs freely mingled with the jury and became a part of the group and identified with the group of twelve true and honest men.

That this is what happened is proven by the testimony of Deputy Simmons himself (Transcript of Record, pages 35-36) and by Deputy Rispone (Transcript of Record, pages 27-28-29).

This is not the sort of conduct contemplated by Louisiana Revised Statute 15:394, which requires that the jury be "secluded from all outside communication" nor is it the sort of conduct which can be approved under the Consti-

tution of the United States, which guarantees every such accused a trial by an impartial jury. It was not approved by Justice Hawthorne who in writing the opinion of the Louisiana Supreme Court in this case said:

> "This court is inclined to look upon the practice with disapproval, however, because in such cases there may be prejudice of a kind exceedingly difficult to establish" (Transcript of Record, page 64).

Nor was similar conduct deemed "becoming" as far back as 1856 in a civil proceeding in which the sheriff, a necessary party to his wife's action, was permitted to perform ministerial duties but not take charge of the jury. *State* v. *Judge of the Sixth Judicial District Court of Point Coupee*, 11 La. Ann. 79 (1856).

It is submitted that the statute does not contemplate that the deputy sheriffs in whose charge the jury is placed should become identified with the group in the sense that they are allowed to mingle freely with the jurors and hold social intercourse with them. It is rather the duty of the deputy sheriffs to segregate the jurors from all outside influence and this includes from themselves. This duty would appear to be increased where the deputy knows he is to be a prosecution witness.

It is true that the mere fact that a deputy is a prosecution witness does not disqualify him from performing his duty with reference to the custody of the jury. But the nature of this duty is not to fraternize with the jury but rather to seclude the jury. When the deputy is a witness elementary fair play and a basic sense of conscience demand that he perform his ministerial duties with an awareness of his dual role.

The case at bar constitutes a flagrant violation of the statute and of the spirit and intent of the Constitution of

the United States and of the State of Louisiana. It cannot be said under these facts and circumstances that the accused was not prejudiced. Nor can it be said that his civil constitutional rights in a capital case were fully protected.

The case at bar and the need for setting aside the verdict below are strengthened by virtue of the fact that this practice, a practice which was disapproved but condoned by Justice Hawthorne in his opinion for the Supreme Court of Louisiana, has become standard operating procedure for the Sheriff's office of the Twenty-first Judicial District Court, Parish of Tangipahoa. The attention of this Court is respectfully directed to the case of *State* v. *McAllister*, 244 La. 42, 150 So. 2d 557. That case involved practically the identical situation with regard to jury handling as does this case. It was tried in the Tangipahoa Parish Court only a few months before the *Turner* case was tried and a bill of exceptions was reserved and perfected in that case on the same point before this Honorable Court for review. With full knowledge of the objection in the *McAllister* case, the Sheriff and his deputies allowed the same thing to occur again.

It thus becomes evident that the pattern is emerging and that unless this Honorable Court puts a stop to this sort of reprehensible conduct, other defendants in criminal cases may be deprived of their constitutional right to a trial by a fair and impartial jury.

In the case of *State* v. *Oteri*, 128 La. 939, 55 So. 582, a capital case decided in 1911, Justice Land stated at page 951 that:

> "We, however, must express our disapproval of the permission given the jury to attend the show, thereby subjecting them to the danger of outside influence. We may add that our ruling would have been different if

any prejudice whatever had been shown by the evidence."

In the *Oteri* case there had been no separation of the jury. The jury had merely attended the theater in the presence of Deputy Erwin who was an important prosecution witness. The instant case is to be distinguished from the *Oteri* case in that there was a separation of the jury on at least nine separate and distinct occasions and that on one of these occasions Juror Paul Casanova was separated and in the company of two witnesses for the prosecution and had been, prior to the arrival of Deputy Simmons, either alone with Deputy Rispone or with him in the presence of an unidentified third person. To quote the *Warren* case, "they were accessible; misconduct is presumed."

The *Oteri* case does not answer or overcome the presumption of prejudice which arises once a physical separation of jury members, one from another, has been shown. Nor does the *Oteri* case apply to the case at bar for even if prejudice were not presumed in the instant case, the reoccurrence of the reprehensible conduct of the deputies, and especially of the deputy-witnesses, of fraternizing with the jury while that very question was on appeal from that very court strongly suggests prejudice and intentional misconduct.

The handling of the petit jury in this case was disapproved of even by the court which placed a stamp of approval on it. It is left for this court to refuse to wink at the misconduct of the deputy sheriffs and protect the rights of the accused to a trial by an impartial jury.

Constitutional Question

The case at bar presents two important constitutional questions for determination. These are:

(1) Is the Constitutional right of an accused to trial by an impartial jury in a capital case denied under circumstances constituting a violation of state law on the subject of separation and seclusion of the petit jury?

(2) Is the right of an accused to trial by an impartial jury denied, regardless of state law, when the jury in a capital case is allowed to associate and fraternize with deputy sheriffs, two of whom are chief prosecution witnesses and when the jurors are allowed to separate into groups as small as one juror in the presence of the deputy-witness?

Throughout the history of the United States trial by jury has been one of the important rights guaranteed to an accused in a criminal trial, especially in a capital case. The law, both State and Federal, surrounds juries with all sorts of special and stringent requirements regulating their qualifications, method of selection and conduct.

The conduct of juries after their selection is closely regulated by statute and custom in order to insure that no opportunity is afforded unscrupulous persons to intentionally tamper with or influence the verdict of the jury.

This is the meaning of that portion of the Sixth Amendment to the Constitution of the United States which guarantees "a speedy and public trial, by an impartial jury."

But it is not only from unscrupulous persons that a jury must be protected. Juries are protected from the weight of public opinion or from the honest and sincere opinions of their friends and relatives. This is evidenced by the

fact that juries are either secluded, or, if permitted by law and the court's discretion to separate, are admonished not to discuss the case with others or to read about it.

The Holy Bible, King James Version, admonishes persons to "Abstain from all appearance of evil." 1 Thessalonians 5:22.

Thus it is written in *Mattox v. United States*, 146 U. S. 140, 149, 13 S. Ct. 50, 53, 36 L. Ed. 917, 921 that:

> "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. *Nor can any ground of suspicion that the administration has been interfered with be tolerated.* Hence, the separation of a jury in such a way as to expose them to tampering, may be reason for a new trial, variously held as absolute; or prima facie, and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place. Whart. Crim. Pl. §§821, 823, 824, and cases cited.
>
> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." (Emphasis added.)

It is clear that this matter has long been considered to be a substantial Constitutional question. Consideration is respectfully directed to the following two lengthy quotations from two lower federal courts:

> "The law, as the government concedes, is that where there is communication and social intercourse between a juror and a party or witness, a presumption of misconduct sufficient to vitiate the verdict arises. The

only question here is whether the circumstances detailed at the hearing affirmatively indicate that no prejudice could result to the defendant. I turn now to a consideration of this question.

The parties have cited numerous authorities which each thinks support the respective positions, but, in cases of this kind, where so much depends on the total situation disclosed by the particular circumstances, analogous cases are of doubtful utility. The number of times Juror 7 and Flounders fraternized in the absence of previous acquaintance or any apparent mutual bond is sufficient to raise suspicious implications . . .

It is unnecessary to make a finding whether the case was actually discussed. It is sufficient that the discussion approached the subject matter of the case much more closely than the juror wished to admit, for I think it perfectly clear that railroading and railroad men were discussed. But even if this were not true, I think the circumstances detailed are sufficient to raise suspicious implications. The conviction of the defendant at bar is very important to the Pennsylvania Railroad; *but defendant has the right, protected by the Bill of Rights, to an impartial trial. If the circumstances are suspicious I think that is sufficient to vitiate the verdict. Little* v. *United States, 10 Cir., 73 F. 2d 861. It would be impossible in most cases by the very nature of things to prove actual misconduct, or that the case was discussed. Moreover, it is not only possible but in most cases it would be more effective to adopt a more subtle approach than making a direct "fix". Impressions created by favorable conversation might be just as effective.* Now it must be conceded in this case that Flounders made a very favorable impression on Juror 7. What influences a particular juror necessarily must be

vague and indefinite" *United States* v. *Marine*, 84 F. Supp. 785, 787 (Del. 1949). (Emphasis added.)

The *Marine* case involved the prosecution of a railroad baggage man for possession of stolen baggage. It appears that the jury, and those in charge thereof, should be held to a much higher degree of caution and should zealously attempt to avoid all appearance of evil and misconduct in a capital case. That this was not done is evidenced not only by the facts of this case but by the fact that this reprehensible practice is becoming standard operating procedure in the courts of this Parish.

"The rebuttable presumption was that these communications by the juror with outside persons were prejudicial to the moving party. *Chambers* v. *United States*, 237 Fed. 531, 421 (CCA 8). There is no evidence in the case that the evidence was rebutted. *The least that can be said about this misconduct of one of the jurors is that it raises a grave doubt whether the constitutional right of plaintiffs in error to a trial by an impartial jury was not infringed*" *Sutherland* v. *United States*, 19 F. 2d 202, 212 (8th Cir. 1927). (Emphasis added.)

An accused should not be required, to prove, as the opinion of the Louisiana Supreme Court does require, once suspicious circumstances have been alleged and proven, that there did in fact exist misconduct or prejudice, either intentional or unintentional. The case of *Little* v. *United States*, 73 F. 2d 861 (10th Cir. 1934) deals with this problem and clearly states that any requirement placing a burden on the accused to show that the irregularities did in fact influence the jury would be a denial of a "fair trial". Quoting further from that opinion, in which the irregular conduct complained of was the court's permitting the court stenographer to read a portion of the jury charge to the jury out-

side the presence of the court, the following language is found at pages 866-7.

> "We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded. But where error occurs which, within the range of a reasonable possibility, may have affected the verdict of the jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial. In this case we know nothing of what went on while the stenographer was in the jury room; it is entirely possible that a shorthand character was misrepresented; emphasis plays an important role in transmission of ideas by word of mouth and the difficult injunction of the court to avoid any emphasis is no assurance that there was none. What else may have occurred, we do not know. No outsider has any business in the jury room; much harm could result, and that is enough. The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

The case most nearly in point as to the facts of the case at bar, and in which the verdict of guilty of rape of a child under 12 was reversed, is a leading Indiana case. *State* v. *Woods*, 233 Ind. 320, 119 NE 2d 558. The following quotation from page 560 of the area reporter discloses a situation very similar to the one in the instant case and rests the reversal of the jury verdict on sound grounds of justice and fair play.

> "There was no motion for a separation of the jury, and the jury did separate at the noon intermission and at the conclusion of each day of the trial. However, when

they returned to the courthouse they were in a room behind the courtroom. Appellant's special bill of exceptions No. 1 fails to contain any diagram of the courtroom and the rooms connected with and under the jurisdiction of the court, and we are not able to determine whether the alleged misconduct of the jury occurred in the regular jury room or in another room which was used as a waiting room by the jury after it had been duly sworn and empaneled to try the cause. In this special bill of exceptions we find the testimony of the two court bailiffs who had charge of the jury and the testimony of counsel for appellant. None of this testimony was contradicted nor did the State introduce any evidence in rebuttal. From this testimony it is made to appear that police officers who were witnesses for the State, and the sheriff, who had been active in attempting to solve the crime, were visiting with members of the jury in the room where the jury gathered during intermissions and recesses. When the trial judge was on the bench, counsel for appellant in open court requested one bailiff to stop the witnesses from visiting with the jury. The next day the visiting continued, and counsel for appellant duly moved for a mistrial which, after a hearing, was overruled by the court. It was not made to appear that any of the conversations had anything to do with the evidence in the cause, yet such conduct cannot escape our condemnation even though the witnesses may have made no attempt to discuss the case. If the appellant during intermissions had been permitted to go in the jury room and visit and fraternize with members of the jury, the State could properly have moved to declare a mistrial. The jury should determine the credibility of witnesses and the weight to be given their testimony from the evidence given upon the trial, and it would be

all too easy for the jury unconsciously to be influenced as to these matters by a friendly association with the witnesses for the State.

Canon 23 of the Canons of Professional Ethics adopted by the American Bar Association states the correct rule for the attorney's conduct toward a jury as follows:

> 'All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.'

"We feel the witnesses for both sides should be required to govern their conduct with equal propriety. The conduct of witnesses in visiting with the jury was prima facie prejudicial to the appellant, and for this cause the judgment must be reversed. 1 Hyatt on Trials, §§933, 934, pp. 949, 950."

Later Indiana cases have required that objection to the association and fraternization be timely made, which was done in the *Turner* case during the trial through counsel's motion for a mistrial (Transcript of Record, pages 27 and 35). *Spencer* v. *State*, 237 Ind. 622, 147 NE 2d 583 (1958) and *Myers* v. *State*, 240 Ind. 641, 168 NE 2d 220 (1960). In the latter case the court found that the presumption had in fact been overcome by the evidence.

It is apparent that the facts of the *Woods* case differ from the facts of the case at bar in only one material aspect.

That is that in the *Woods* case the objectionable fraternization continued after counsel had requested that it cease. Analogous to this, however, is the fact that the same conduct had been objected to by counsel in the *McAllister* case only months before in the same trial court, and yet this conduct reappeared during the trial of the appellant now before this court.

It is for this court to decide whether or not the physical separation of the jury members contrary to State law; the free association, fraternization and mingling with the jury by deputy sheriffs, two of whom were chief prosecution witnesses; and the isolation of one petit juror in the company of three deputy sheriffs, two of whom were the same two chief prosecution witnesses; where these practices are becoming standard procedure in this Parish despite objection, gives rise to circumstances sufficient to warrant the setting aside of the verdict of guilty in this capital case.

The practice of allowing an interested deputy to fraternize with the jury has long been deemed unbecoming in Louisiana. *State* v. *Judge of the Ninth Judicial District Court of Point Coupee, supra.* The practice was specifically disapproved of in the opinion of the Louisiana Supreme Court in this case, but was allowed to stand because the accused failed to prove actual misconduct (Transcript of Record, page 64). A practically identical situation in Indiana resulted in a reversal of the jury verdict in a non-capital case and the granting of a new trial. *State* v. *Woods, supra.* The *Little Mattox* and *Marine* decisions *supra* recognize that suspicious circumstances and not actual of misconduct were sufficient to entitle the accused to a new trial under the Bill of Rights.

Certainly the circumstances of the case at bar are suspicious, both from the legal presumption which arises under

state law upon the physical separation of jurors, one from another; and from the proven circumstances of unnecessary fraternization and association, of the renewing of old friendships and establishing of new acquaintances between the deputy-witnesses and the jurors. Certainly the time has come not only to label these practices as unbecoming and disapproved, but to prohibit them altogether.

Conclusion

In the opinion of court appointed counsel for Wayne Turner, an indigent defendant, the Supreme Court of the United States should set aside the verdict of the district court of the 21st Judicial District of Louisiana, Parish of Tangipahoa, on the ground that the same was obtained without due regard for the constitutional right of the accused to trial by an impartial jury and order the trial court to proceed immediately to grant the accused, Wayne Turner, a new trial in conformity with the opinion expressed by this Honorable Court and with due regard and protection for all of his constitutional rights.

Respectfully submitted,

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Certificate of Service

I, Allen B. Pierson, Jr., one of the attorneys for Wayne Turner, appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 21st day of August, 1964 I served a copy of the foregoing brief on Michael E. Culligan, Assistant Attorney General, 104 Supreme Court Building, 301 Loyola Avenue, New Orleans, Louisiana, counsel for the State of Louisiana, by mailing a copy of said brief to him first class, postage prepaid, the envelope duly addressed as above.

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